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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE APPLICATION OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC FOR APPROVAL OF AN AMENDMENT FOR ELIMINATION OF UNE-P AND IMPLEMENTATION OF BATCH HOT CUT PROCESS AND QPP MASTER SERVICE AGREEMENT.	**DOCKET NO. T-01051B-04-0540** **T-03574A-04-0540** **NOTICE OF SERVICE OF QWEST'S EXCEPTIONS TO PROPOSED ORDER AND MOTION TO EXTEND TIME FOR QWEST REPLY BRIEF**

Pursuant to the Procedural Order dated July, 11, 2005, on July 14, 2005, Qwest Corporation ("Qwest") served copies of the attached Qwest Exceptions to the Recommended Order on each of the parties on the service list of the Recommended Order.

Further, Qwest respectfully requests that the date set by the Procedural Order for Qwest's Reply to Responses to Qwest's Exceptions be extended from August 15, 2005 to August 19, 2005, due to conflicts in the schedule of Qwest's counsel. Qwest believes that no harm or prejudice will result to any party by reason of such extension. Counsel for Staff and MCI, the active participants in this docket to date, have consented to such extension.

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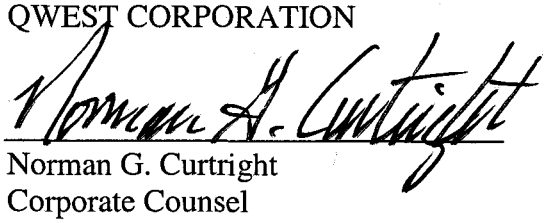
RESPECTFULLY SUBMITTED this 14th day of July, 2005.

QWEST CORPORATION

By 

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

IN THE MATTER OF THE APPLICATION OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, FOR APPROVAL OF AN AMENDMENT FOR ELIMINATION OF UNE-P AND IMPLEMENTATION OF BATCH HOT CUT PROCESS AND QPP MASTER SERVICE AGREEMENT.	DOCKET NO. T-01051B-04-0540 DOCKET NO. T-03574A-04-0540

QWEST CORPORATION'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED OPINION AND ORDER DENYING QWEST'S MOTION TO DISMISS

I. INTRODUCTION

Qwest Corporation ("Qwest") respectfully submits these exceptions to the Recommended Opinion and Order Denying Motion To Dismiss ("ROO") issued by the Administrative Law Judge in these combined dockets on June 28, 2005. For the reasons set forth below, the Commission should reject the ROO and grant Qwest's Motion to Dismiss Application for Review of Negotiated Commercial Agreement.

Under the Telecommunications Act of 1996 ("the Act"), telecommunications carriers are only required to file for approval by state commissions "interconnection agreements," a term of art that the FCC and a federal court have defined as agreements that relate to ongoing obligations to provide services required under Sections 251(b) and (c) of the Act. The authority of state commissions to review and approve interconnection agreements is limited to agreements that involve such obligations. Pursuant to unambiguous and binding rulings of the U.S. Court of Appeals for the D.C. Circuit [1] and the Federal Communications Commission's ("FCC's")

[1] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568, 573, 595 (D.C. Cir. 2004) ("*USTA II*").

Triennial Review Remand Order,[2] Qwest no longer has any duty under Section 251 to provide either the switching or shared transport network elements that are the subject matter of the commercial agreement – the Qwest Master Services Agreement (referred to herein as the "QPP Agreement") – at issue in this case. Qwest's voluntary decision to provide switching and shared transport through the QPP Agreement thus does not involve an *ongoing obligation* to provide services required under Sections 251(b) or (c), and there is, therefore, no requirement for Qwest to file the agreement with this Commission for review and approval and no jurisdictional basis for the Commission to assert authority over the agreement.

Qwest's primary objection to the ROO is its adoption of a filing standard under Section 252 that includes agreements addressing non-Section 251 services. As shown below, the Commission does not have authority over consensual, privately-negotiated commercial agreements that do not involve ongoing obligations to provide services required under Sections 251(b) and (c). Indeed, the ROO's exercise of that authority conflicts directly with the Act's fundamental objective of transitioning the telecommunications industry away from a regime of extensive regulation and toward a more market-driven, deregulatory structure.[3]

The statement of law above that the Section 252 filing requirement is limited to agreements addressing Section 251 services is confirmed by two recent decisions addressing the same issue that is before the Commission in these dockets. In contrast to the ROO, the Minnesota Commission recently issued an order (attached hereto as "Exhibit A") relating to the identical QPP agreement at issue here.[4] Recognizing the principles discussed above, the commission ruled that carriers are only required to file for review and approval interconnection agreements that

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[2] Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Dkt. Nos. WC 04-313/CC 01-338, FCC 04-290, 2005 WL 289015 (February 4, 2005) ("*TRRO*").

[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 62, n.198 (2003) ("*Triennial Review Order*" or "*TRO*").

[4] Order Releasing Agreement from Review, *Qwest Corporation and MCImetro Access Transmission Services Amendment to Interconnection Agreement*, Minnesota Public Utilities Commission, Docket No. P-5321, 421/IC-04-1178 (May 18, 2005) ("Minnesota Order").

relate to providing access to elements and services under Section 251. Thus, it ruled that the QPP agreement need not be filed for approval. The Minnesota Commission accurately stated that the kind of interconnection agreement that triggers the Section 252 filing requirement is one that contains Section 251 network elements. Thus, the Commission ruled that agreements between ILECs and CLECs that do not contain Section 251 elements need not be approved or rejected by the Commission pursuant to Section 252(e).[5]

Similarly, in a decision issued just last month, a *federal* court applying the *federal* filing standard set forth in the Act and the *Declaratory Order* ruled that the same filing standard adopted in the ROO is unlawful and violates the plain language of the Act, the *Declaratory Order*, and the policies underlying the Act. In *Qwest v. Montana Public Service Commission*,[6] a federal district court in Montana ruled that the Montana Commission exceeded its authority and violated the Act's filing requirement by requiring Qwest and Covad Communications Company to submit for review and approval a commercial agreement relating to the network element known as line sharing. Like the ROO, the Montana Commission had ruled that the commercial agreement is an interconnection agreement subject to the Section 252 filing requirement even though it does not contain any ongoing obligations relating to sections 251(b) or (c).

The federal court ruled unequivocally that the Montana Commission's filing standard is unlawful based on the plain language of the Act:

> Having considered all of the parties' arguments, the Court concludes that *section 252's language limits the requirement that agreements be submitted to state commissions for approval to those agreements that contain section 251 obligations*. Because line sharing, which is the subject of Qwest's [commercial agreement] with Covad, is not an element or service that must be provided under section 251, there is no obligation to submit the [commercial agreement] to the PSC for approval under section 252.[7]

The court explained further that its ruling striking down the Montana Commission's filing standard also is required under *Declaratory Order*. The court emphasized that in that Order, the

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[5] Minnesota Order at 3.

[6] CV-04-053-H-CSO, Order on Qwest's Motion for Judgment on Appeal (D. Mont. June 9, 2005) ("Montana Order"). A copy of this order is attached as "Exhibit B."

[7] *Id.* at 14.

FCC expressly concluded that "'only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1).'"[8] The Montana Commission, the court ruled, had improperly ignored and failed to give effect to this "clear language of the Declaratory Order."[9]

Equally significant, the federal court emphasized that its ruling invalidating the Montana Commission's filing standard "is consistent with the intent of the [1996 Act]."[10] The court stated that "in enacting the [Act], [Congress] sought to promote competition by removing unnecessary impediments to commercial agreements entered between ILECs and CLECs . . . ."[11] Under the court's ruling, the Montana Commission's filing standard was precisely the type of "unnecessary impediment" that Congress intended to eliminate.

The ROO does not distinguish these rulings from a federal court applying and interpreting federal law. To uphold and adopt the ROO, the Commission would have to determine not to give this federal decision any effect. Instead, the Commission should adopt the reasoning of the court and the Minnesota Commission and not adopt the ROO.

II. BACKGROUND

Under the Master Services Agreement between Qwest and MCIMetro, Qwest agrees to provide Qwest Platform Plus™ or "QPP." QPP consists of two network elements: switching and shared transport. As discussed in detail below, it is undisputed that Qwest is no longer required to provide either of these elements under Section 251(c)(3) of the Act.

The QPP Agreement allows the switching and shared transport elements to be used with other network elements for which Qwest still has a duty under Section 251(c)(3) to provide. However, the QPP Agreement states that those other elements continue to be provided pursuant to

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[8] *Id.* (quoting *Declaratory Order* at ¶ 8, n.26)(emphasis in original).

[9] *Id.*

[10] *Id.* at 16.

[11] *Id.*

a separate interconnection agreement ("ICA") between the parties and that the QPP Agreement does not alter or amend the preexisting ICA as it relates to the elements that Qwest must continue to provide under Section 251(c)(3). That is, there are no terms or conditions in the QPP agreement for the provisioning of Section 251 services; all of the terms and conditions for Section 251 services are contained in separately filed and approved ICA amendments.

Upon entering into the QPP Agreement with MCI, Qwest provided it to the Commission for informational purposes, placed it on its website, and offered the terms of the agreement to any other CLEC. MCI formally filed the QPP Agreement with the Commission on July 23, 2004, and requested that the Commission review and approve it. Based on the FCC's ruling that only agreements addressing Section 251 services should be filed with state commissions for review and approval, Qwest filed a motion to dismiss on August 6, 2004. Following briefing and oral argument, the ALJ issued the ROO denying Qwest's motion on June 28, 2005.

In ruling that the QPP Agreement is subject to review and approval by the Commission despite the fact the Agreement does not relate to any ongoing obligations relating to Sections 251(b) or (c), the ALJ has adopted a filing standard that is contradicted by the language in Section 252 and by the FCC's binding *Declaratory Order* that sets forth the Act's filing standard. As discussed above, the ruling also is inconsistent with the recent rulings by a federal district court in Montana and the Minnesota Commission relating to this same issue.

Equally significant, the ALJ's ruling is inconsistent with and contradicted by arguments that the Arizona Staff has previously presented to this Commission in another docket. Indeed, consistent with Qwest's position and the recent Montana and Minnesota rulings, Staff argued in a previous docket before the Commission that whether an agreement must be filed under Section 252(a)(1) and 252(e) turns on whether the agreement creates ongoing obligations under Section 251(b) and (c). That is a different standard than Staff urged in this proceeding and the ALJ

adopted.

The cornerstone of Qwest's motion to dismiss is the unequivocal statement by the FCC, "we find that ***only*** those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)."[12] Although Staff now argues for a different standard than that declared by the FCC, such was not always the case. In a proceeding before this Commission in which Qwest's obligations to file certain agreements under Section 252 was at issue,[13] the Staff discussed the *Declaratory Order* at considerable length. In a section of the Staff Post-Hearing Brief entitled, "Operator Services, Directory Services and ICNAM Services are Section 251(b) or (c) Services and Provisions Containing Ongoing Obligations Relating to These Services are Interconnection Agreements and Must be Filed with the Commission for Approval," Staff stated:

> "The filing requirement contained in Section 252(a)(1) applies to both 251(b) and (c) services." *Moreover, in its Declaratory Ruling, the FCC recognized that* Section 251(c)(1) requires incumbent LECs to negotiate in good faith, in accordance with Section 252, the particular terms and conditions of agreements to implement their duties set forth in Sections 251(b) and (c) *(footnote citing FCC Declaratory Ruling at para. 8.) Further, if one closely examines the FCC's standard, it refers to an agreement that creates an ongoing obligation with regard to* inter alia *"dialing parity" . . . . Therefore, clearly terms and conditions pertaining to its ongoing obligations with regard to the nondiscriminatory provision of operator services and directory assistance is an interconnection agreement which must be filed under Section 252(a)(1) and 252(e). Accordingly, Staff believes that Qwest's Operator Service, Directory Assistance and ICNAM Service agreements with Allegiance constitute interconnection agreements that Qwest is required to file under Section 252(a)(1) and 252(e) of the Act*[14] *(emphasis added).*

In the Unfiled Agreements Case, Staff also stated,

> As the FCC stated in its Declaratory Ruling, the label or name of an agreement is not controlling as to whether it needs to be filed or not; rather one must look at the substance of the agreement to determine whether it contains ongoing obligations

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[12] *Declaratory Order*, at para 8 & 26 (Emphasis added).

[13] *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996,* Docket No. RT-00000F-02-0271 (the "Unfiled Agreements Case").

[14] *Id.*, Staff's Initial Post-Hearing Brief Confidential Version, p. 12, submitted May 1, 2003.

relating to Section 251(b) and (c) services.[15]

In the Unfiled Agreements Case, the Staff's advocacy regarding what interconnection agreements were required to be filed under Section 252(a)(1) and 252(e) depended on a proper reading of the FCC ruling – whether the services addressed by the agreement relate to ongoing obligations under Section 251(b) and (c). In the case now before the Commission, however, the Staff suggests that the rule laid down in the *Declaratory Order* is a novel interpretation. In fact, as is clear from the statutory language, the FCC's *Declaratory Order*, the Minnesota Commission Order and the ruling from the Montana federal court, the Staff's recent arguments in this matter are not supported by law.

III. ARGUMENT

A. The Requirement For Carriers To File Agreements With State Commissions For Review And Approval Applies Only To Agreements Involving Ongoing Obligations Under Sections 251(b) or (c).

The Act imposes duties upon ILECs and CLECs and requires carriers to set forth the terms and conditions relating to those duties in negotiated or arbitrated interconnection agreements that must be filed with state public utility commissions under Section 252 for approval.[16] The duties of ILECs and CLECs that must be set forth in interconnection agreements subject to commission review and approval are described in Section 251. Section 251(b) requires both ILECs and CLECs to: (b)(1) allow the resale of each others' services, (b)(2) provide number portability, (b)(3) provide dialing parity, (b)(4) provide access to rights-of-way, and (b)(5) establish reciprocal compensation arrangements. Section 251(c) imposes six other requirements only upon ILECs, four of which are services that could be the subject of an agreement: (c)(2) provide interconnection of the ILEC network to other networks, (c)(3) provide access to UNEs, (c)(4) allow CLECs to resell services at wholesale rates, and (c)(6) provide for collocation of CLEC equipment in ILEC buildings.

In the *Declaratory Order*, the FCC concluded that the ***only*** agreements carriers must file

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[15] Staff's Reply Brief Confidential Version, p. 5, filed May 15, 2003.

[16] 47 U.S.C. § 252(e)(1).

for approval are interconnection agreements that create ongoing obligations relating to these duties imposed by Sections 251(b) and (c).[17] In that order, the FCC defined the agreements that must be submitted to state commission for review and approval as those that

> Create[] an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, *unbundled network elements*, or collocation.[18]

The services listed that trigger a Section 252 filing obligation ***track precisely and sequentially with the list of services that LECs and CLECs must provide under Section 251(b) and (c), and no others***. To be even more precise, the FCC followed this statement through a footnote, conclusively ruling that there is no requirement that an ILEC file *all* agreements with CLECs:

> We . . . disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier . . . . Instead, we find that only those agreements that contain an *ongoing obligation relating to section 251(b)* must be filed under section 252(a)(1).[19]

Consistent with the Act's de-regulatory purpose, there is no requirement for carriers to file and seek regulatory approval of agreements that do not address the Section 251(b) and (c) requirements.

It is undisputed that Qwest has no obligation under Section 251(c)(3) to provide the switching and transport network elements that comprise QPP. Section 251(d)(2) provides that an ILEC's obligation to lease portions of its network exists *only* where the FCC finds that "the failure to provide access to such network elements *would impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[20] Thus,

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[17] Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, ¶ 8, n.26 (Oct. 4, 2002) ("*Declaratory Order*").

[18] *Declaratory Order* ¶ 8 (italics in original).

[19] *Id.* n.26 (italics in original; underlining added).

[20] 47 U.S.C. § 251(d)(2) (emphasis added).

unless the FCC specifically determines that the failure to provide a specific element *would impair* the ability of competitors to provide the services they seek to offer, the ILEC has no Section 251(c)(3) duty to provide the particular element. In *USTA II,* the U.S. Court of Appeals for the D.C. Circuit in *USTA II* vacated the FCC rules that would have required ILECs to continue to provide switching and shared transport as UNEs under Section 251(c)(3).[21] On remand, the FCC, consistent with *USTA II,* expressly found that switching and shared transport are no longer required UNEs.[22] Thus, ILECs no longer are required to provide switching and shared transport as UNEs under Section 251(c)(3).

The ROO improperly expands the scope of the filing requirement by stating that agreements between an ILEC and a CLEC containing terms and conditions for non-251 services are subject to the Section 252 filing obligation. Thus, the ROO requires Qwest to submit the QPP Agreement for Commission review and approval despite the fact the agreement does not involve any obligations to provide services required by Sections 251(b) or (c). While LECs must file for approval interconnection agreements relating to the UNEs that an ILEC must provide under Section 251(c)(3), there is no obligation to file agreements relating to network elements that an ILEC is not required to provide under Section 251(c)(3) and that the ILEC provides through commercial, arms-length negotiations and agreements. The absence of any obligation under Section 251(c)(3) to provide switching or transport removes the QPP Agreement from the categories of agreements that carriers must file with state commissions for review and approval.

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[21] *USTA II*, 359 F.3d at 568, 573, 595.

[22] *TRRO* ¶ 199.

B. The Recommended Opinion and Order Incorrectly Construes And Applies The FCC's *Declaratory Order*.

1. The Recommended Opinion and Order Fails To Analyze Whether The QPP Agreement Contains Any Ongoing Obligations Under Sections 251(b) or (c).

The ROO relies on a flawed interpretation of the *Declaratory Order* that is contradicted by the language of the *Declaratory Order* and by Section 252(a)(1) itself. The ROO recites the standard contained in the *Declaratory Order* but then rules that under Section 252(a)(1), carriers have a broad obligation to file any agreements involving ongoing obligations relating to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation *without regard to whether such agreements involve any ongoing obligations under sections 251(b) or (c).* ROO at ¶ 7. Thus, conspicuously absent from the ROO is any analysis of whether the QPP Agreement contains any obligations under Sections 251(b) or (c). However, the filing requirement in Section 252 expressly applies to "interconnection agreements," which, as discussed above, are defined by the FCC as agreements containing ongoing obligations under Sections 251(b) or (c). There is no basis either in the Act or in the *Declaratory Order* for the broad standard adopted in the ROO.

The ROO attempts to support the standard adopted therein by relying on the following isolated quote from the *Declaratory Order* in which the FCC discusses the definition of "interconnection agreement," while ignoring the much broader context of the Act and the *Declaratory Order*:

> [W]e find that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to Section 252(a)(1).

ROO at ¶ 5. However, the ROO does not account for the fact that the services listed in this standard are Section 251(b) and (c) services only. Under the ALJ's ruling, in determining whether an agreement must be submitted under Section 252, it is entirely irrelevant that the agreement may not contain any obligations imposed by Section 251.

This reading of the *Declaratory Order* is demonstrably incorrect. The network elements and services listed in the part of the *Order* on which the ALJ relies are taken directly from the

titles to the subsections in Sections 251(b) and (c) and therefore cannot be read in isolation from those sections. The FCC confirmed this fact when it described the definition of "interconnection agreement" in the *Declaratory Order* as simply "a summary of the interconnection obligations listed in section 251."[23] The fact that the FCC incorporated those obligations into its definition of the "interconnection agreements" that carriers must submit to state commissions demonstrates conclusively that state commissions only have authority to review agreements containing Section 251(b) or (c) obligations. This conclusion is supported further by the fact that the FCC has long considered Sections 251 and 252 to comprise an integrated "section 251/252 negotiation process"[24] and has explicitly stated that "the [section 252] filing requirement *is a part of* the section 251 interconnection obligation, not a separate requirement." *Notice*, ¶ 43 (emphasis added). Thus, it is clear that the "ongoing obligation" the FCC referred to in the *Declaratory Order* means a contractual obligation in an interconnection agreement that satisfies a regulatory obligation imposed by Section 251.

2. The Recommended Opinion and Order Incorrectly Limits The Categories Of Agreements That Carriers Are Not Required To Submit For Review And Approval.

Although the *Declaratory Order* states unambiguously that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)," the ROO concludes that the statement does not mean what it says. According to the ROO, Qwest is reading this plain statement by the FCC out of context and that what the FCC actually meant to say is that "only a narrow subset of agreements would not be subject to the Section 252 filing requirement . . . ." ROO at ¶ 7. This conclusion is based on a fundamental misreading of the *Declaratory Order* and should be rejected.

After ruling in the *Declaratory Order* that carriers are only required to file interconnection

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[23] Notice of Apparent Liability for Forfeiture, *Qwest Corporation Apparent Liability for Forfeiture*, FCC 04-57, 19 FCC Rcd 5169, (2004)("*Notice*"), n.70.

[24] First Report and Order, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-98, 95-185, 11 FCC Rcd 15499 (1996)("*Local Competition Order*"), ¶ 1322.

agreements involving ongoing obligations under Sections 251(b) and (c), the FCC declined to provide an exhaustive list of the types of agreements that meet or fall outside that standard. Thus, the FCC stated that while it was defining "the basic class of agreements that should be filed," it was not "address[ing] all the possible hypothetical situations presented in the record before us."[25] At the same time, the FCC did address whether a small number of specific agreements at issue in another proceeding were within the Section 252 filing requirement. Applying the standard of an "ongoing obligation relating to section 251(b) or (c)," the FCC concluded that carriers are not required to file settlement agreements relating to "backward-looking" billing disputes, order and contract forms that CLECs submit to an ILEC to request service, or certain agreements with bankrupt competitors entered into at the direction of a bankruptcy court or trustee.[26]

Although the FCC expressly stated that it was not providing an exhaustive list of the types of agreements that do or do not meet the Section 252 filing requirement, the ROO nonetheless concludes that the three types of agreements the FCC specifically addressed comprise an exhaustive list of the agreements that carriers are not required to file. ROO at ¶ 7 and n.10. Because the QPP Agreement is not within any of these "exceptions" to the filing requirement, the ROO concludes, it must be filed for review and approval. *Id.*

The legal error of this conclusion is demonstrated not only by the FCC's very clear statement that it was not providing a complete list of agreements that fall outside the filing requirement, but also by the analysis that led the FCC to the conclusions it reached relating to the small number of agreements it addressed. Significantly, the FCC's analysis of those agreements focused on whether they involved any ongoing obligations relating to Sections 251(b) and (c). For example, while the ROO states that the FCC exempted dispute resolution and escalation

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[25] Declaratory Order at ¶¶ 10, 11.

[26] *Id.* at ¶¶ 12-14.

clauses from the filing requirement (ROO at note 10), that is incorrect. Instead, the FCC ruled that "agreements addressing dispute resolution and escalation provisions *relating to the obligations set forth in sections 251(b) and (c)* are appropriately deemed interconnection agreements."[27] Similarly, while finding that settlement agreements involving "backward-looking" billing disputes are not subject to the filing requirement, the FCC ruled that "a settlement agreement that contains an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[28]

Rather than supporting the ROO, as the ALJ concludes, these examples in the *Declaratory Order* demonstrate the ROO's invalidity. The examples demonstrate that in determining whether an agreement must be submitted to a state commission for review and approval, a state commission must first analyze whether the agreement contains any ongoing obligations under Sections 251(b) or (c). The ALJ did not perform that analysis of the QPP Agreement and, as demonstrated above, the QPP Agreement does not contain any such obligations.

Finally, the ROO's statement that Qwest is interpreting footnote 26 of the *Declaratory Order* out of context is disproven by the circumstances that underlie the footnote. The footnote refers to comments submitted to the FCC by the Office of the New Mexico Attorney General and the Iowa Office of the Consumer Advocate in which those parties argued that "any interconnection agreement" should be submitted to a state commission for approval. The FCC considered that broad standard and rejected it, adopting instead the narrower "only Section 251 obligations" standard. This interpretation of the *Declaratory Order* is not grounded upon improper context; instead, it is based on the FCC's express language and its application of that language to the specific types of agreements considered in the *Declaratory Order*.

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[27] *Declaratory Order* at ¶ 9 (emphasis added).

[28] *Id.* at ¶ 12 (emphasis added).

3. The Recommended Opinion And Order Incorrectly Converts A Process By Which Carriers Submit Agreements For Initial Review By State Commissions Into A Jurisdictional Grant Of Approval Authority.

In an attempt to support its filing requirement, the ROO quotes the FCC's statement in the *Declaratory Order* that "state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected." ROO at ¶ 5 (quoting *Declaratory Order* at ¶ 10). The ROO also relies on the FCC's related statement that "the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements." ROO at ¶ 5 (quoting *Declaratory Order* at ¶ 7). According to the ROO, a ruling that the QPP Agreement does not have to be filed for review and approval "would unduly restrict the responsibilities of state commissions to determine 'in the first instance' whether agreements between incumbent LECs and requesting carriers should be approved." ROO at ¶ 8.

However, a plain reading of the *Declaratory Order* shows that the language the ROO cites was intended to establish only that a state commission should conduct a review "in the first instance" to determine whether an agreement is an interconnection agreement that is subject to the commission's review and approval authority under Section 252. In other words, the first step in the process is for a commission to determine if an agreement is an "interconnection agreement." If the commission concludes based on that review that the agreement meets the FCC's definition of an interconnection agreement – that it contains ongoing obligations relating to Sections 251(b) and (c) – then the commission may proceed to the second step and review the agreement for approval. On the other hand, if the commission determines that the agreement does not contain ongoing obligations relating to Sections 251(b) and (c) and is thus not an interconnection agreement, it does not proceed to the review and approval process. Under the ROO, the first step in this process is effectively eliminated, as it is assumed that all but a sub-set of agreements between carriers are subject to review and approval. That outcome violates the *Declaratory Order*, since it will result in the Commission exercising approval authority over agreements that

do not contain Section 251(b) or (c) obligations.

To facilitate the first step in the process outlined by the FCC, Qwest submitted the QPP agreements to state commissions so that the commissions could review the agreements to determine whether they are "interconnection agreements" subject to the commissions' review and approval. In this case, for example, Qwest submitted the QPP agreement to this Commission. There is thus no merit to the conclusion in the ROO that Qwest's position "would unduly restrict the responsibilities of state commissions to determine 'in the first instance' whether agreements between incumbent LECs and requesting carriers should be approved." ROO at ¶ 8. Just as it did here, Qwest can continue to submit agreements with CLECs containing ongoing terms to the Commission to permit the Commission to determine whether the agreements are interconnection agreements subject to the Commission's review and approval authority.

B. By The Express Terms Of Sections 252(a) And 252(e), The Filing Requirements In Those Sections Do Not Apply To The QPP Agreement.

1. The QPP Agreement Is Not A Negotiated Agreement Within The Meaning Of Section 252(a).

In an attempt to fit the QPP Agreement into the Section 251/252 regulatory structure, the ROO concludes without explanation that "the QPP Agreement is clearly a negotiated agreement within the meaning of section 252(a)(1)." ROO at ¶ 11. This finding is both legally and factually incorrect.

Section 252(a)(1) provides:

> Upon receiving a request for interconnection, services, or network elements *pursuant to section 251 of this title*, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. *The agreement . . . shall be submitted to the State commission under subsection (e) of this section.*[29]

The introductory clause – "Upon receiving a request for interconnection, services, or network elements *pursuant to section 251 of this title*" – makes clear that everything that follows in that

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[29] 47 U.S.C. § 252(a)(1) (emphasis added).

sentence must be read in the context of services required by Section 251. Although the ROO does not analyze this language, the effect of the ALJ's ruling is to treat the introductory phrase of Section 252(a)(1), which limits its scope to network elements provided "pursuant to section 251," as though it did not exist. Thus, to give credence to the ROO's conclusion, the Commission would have to eliminate the quoted language from the statute, thus violating the principle that courts should construe statutes "to give every word some operative effect."[30]

In addition, the Agreement itself contradicts the ROO's finding that the Agreement is a negotiated agreement within the meaning of Section 252(a)(1). The Agreement plainly states both Qwest's and MCIMetro's intent and agreement that Section 271, not Section 252(a)(1) is the source of the Agreement: "This Agreement is offered by Qwest in accordance with Section 271 of the Act."[31] There is no other evidence in the record that contradicts this binding statement in the Agreement.

2. Section 252(e)(1) Does Not Impose A Filing Requirement Separate From Section 252(a)(1).

While the ROO does not include any analysis of the filing language set forth in Section 252(e)(1), the ALJ cites with disapproval Qwest's "assert[ion] that the Commission's authority under section 252(e)(1) to approve interconnection agreements is limited to agreements concerning section 251(b) and (c) obligations." ROO at ¶ 11. Relatedly, in another section of the ROO, the ALJ relies on – but neither quotes nor analyzes – the language in Section 252(e)(1) that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission." ROO at ¶ 6. If the intent of these references is to suggest that Section 252(e)(1) imposes a filing requirement separate from Section 252(a)(1) that is not

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[30] *Cooper Industries v. Aviall Services,* 125 S.Ct. 577, 584 (2004) (the "settled rule" is "that we must, if possible, construe a statute to give every word some operative effect"); *United States v. Tsosie,* 376 F.3d 1210, 1217 (10th Cir. 2004) ("we are also guided by the traditional canon of statutory construction that courts should avoid statutory interpretations which render provisions superfluous"); *Foutz v. City of South Jordan,* 100 P.3d 1171, 1174 (Utah 2004) *quoting Perrine v. Kennecott Mining Corp.* 911 P.2d 1290, 1292 (Utah 1996) ("We strive to construe statutes in a manner that renders 'all parts thereof relevant and meaningful.'").

[31] *Id.* ¶ 26; *see also id.*¶ 4.3.

dependent upon the presence of Section 251(b) or (c) obligations in an agreement, that conclusion is wrong.

Section 252(e)(1) provides:

> Any interconnection agreement adopted by negotiation or arbitration *shall be submitted* to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[32]

The "interconnection agreements adopted by negotiation" language refers to Section 252(a)(1), which, as discussed above, relates only to services or elements required by Section 251. Second, the reference to agreements "adopted by . . . arbitration" relates to Section 252(b) and (c), the subsections that define state commissions' duties and powers to arbitrate agreements. Section 252(c)—which defines the standards for arbitration—requires a state commission, in exercising its Section 252 authority, to "ensure that such resolution and conclusions meet the requirements of *section 251* of this title, including the regulations prescribed by the [FCC] pursuant to *section 251* of this title."

For both negotiated and arbitrated agreements, the filing requirement and state commission approval authority explicitly relate back to services required under Section 251. Thus, the filing obligations of Section 252 arise only if a Section 251 service or element is the subject of the agreement. In the *Declaratory Order*, the FCC interpreted the Section 252 filing requirement in precisely the same way.

It is a well-established "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[33] "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole."[34] Here, the language and

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[32] *Id.* § 252(e)(1) (emphasis added).

[33] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[34] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

structure of the statute indicate that the negotiated agreements referred to in Section 252(e)(1) are the same negotiated agreements referred to in Section 252(a)(1). Indeed, there is no indication in Section 252(e)(1) that the reference to negotiated agreements means anything other than the "Agreements Arrived at Through Negotiation" described in section 252(a)(1). The plain language of the statute provides no support for the Commission's expansive reading.

Further, a review of other FCC decisions discussing both Sections 252(a)(1) and 252(e) shows that the FCC views Section 252(a)(1), not Section 252(e)(1), as the statutory basis for the filing requirement.[35] The FCC invokes Section 252(e)(1) in discussing state commissions' authority to approve or reject filed interconnection agreements, not in discussing the filing requirement itself.[36] Thus, the FCC's decisions recognize that Section 252(e)(1) is not a *separate* filing requirement and thus adds no additional or different constraints to the Section 252(a)(1) filing requirement.

2. The Recommended Opinion and Order Concludes Incorrectly That The QPP Agreement Is Integrated With The Qwest/MCI Interconnection Agreement And Is Thus Subject To The Commission's Review And Approval.

The ROO concludes erroneously that the QPP Agreement and the Qwest/MCI amendment to their Section 252 interconnection agreement are "clearly integrated agreements that are not severable." ROO at ¶ 9. This alleged inseverability, the ALJ concludes, supports the ruling that the QPP Agreement must be submitted for review and approval. This conclusion is without factual or legal support.

It has long been established in Arizona and elsewhere that in reviewing and interpreting

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[35] *See, e.g.*, Notice ¶ 4 ("Section 252(a)(1) of [the Act] requires incumbent LECs to negotiate interconnection agreements with CLECs. Once finalized, the agreements must be submitted to state commissions for approval under section 252(e)."); Order, *Application by Qwest for Authorization to Provide InterLATA Services*, CC Dkt. No. 02-314, 17 FCC Rcd 26303 (2002) ("*Qwest Section 271 Order*"), ¶ 472 (interconnection agreements "must be filed pursuant to section 252(a)(1)"); *Local Competition Order*, ¶¶ 166-167 (same).

[36] *Notice*, ¶¶ 4; 26; *Qwest Section 271 Order*, ¶495; *Local Competition Order*, ¶ 1290.

contracts, it is essential "to effectuate the parties' intent, giving effect to the contract in its entirety."[37] The intent of contracting parties should be determined by "consider[ing] the language of the contract in view of the surrounding circumstances."[38]

Here, the QPP Agreement itself establishes that Qwest and MCI intended to enter into separate and independent agreements. The Agreement's integration clause states that the Agreement "constitutes the full and entire understanding and agreement between the Parties" and expressly provides that nothing in the Agreement "is intended by the parties to amend, alter, or otherwise modify" the terms and conditions of the ICA.[39] Indeed, the QPP Agreement and the ICA Amendment were drafted in strict conformity with the FCC's Section 252 filing standard. That is, all of the terms setting rates or other conditions for non-Section 251 services are contained in the QPP Agreement, and all of the rates and other terms for Section 251 services are set forth in the ICA Amendment. The parties set forth these terms and conditions in separate agreements precisely because they intended and desired to have independent, severable agreements. By concluding that the agreements are integrated, the ROO ignores the parties' plain contractual intent in violation of a basic tenet of contract construction.

The ROO does not include any analysis of the parties' intent, which is essential to a determination of whether the agreements are integrated or severable. Instead, the ROO relies on inaccurate inferences drawn from isolated provisions in the QPP Agreement. For example, the ROO relies on the fact that if the rate for the unbundled loop in the ICA changes, the rate for the QPP service will change. ROO at ¶ 9. But this analysis misses the point. The relevant question

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[37] *Potter v. U.S. Specialty Insurance Co.*, 98 P.3d 557, 559 (Ariz. Ct. App. 2004).

[38] *Id.*; *see also Clark v. Levy*, 220 P. 232, 234 (Ariz. 1923) ("The question as to whether several instruments concerning the same subject-matter should be construed as constituting but one transaction is always influenced by the surrounding facts and circumstances and each case is largely controlled by its own peculiar facts.").

[39] *See* QPP Agreement at ¶ 33.

is whether the QPP Agreement contains rates, terms and conditions that for the provisioning of Section 251 services. Loops serving mass market customers currently are Section 251 services, and, accordingly, all rates, terms and conditions relating to loops must be contained in a Section 252 agreement. Qwest and MCI have placed each term for to loops in their interconnection agreement on file with this Commission. The ROO does not identify a term or provision in the QPP Agreement itself that reflects the loop rates, and, indeed, there are none. The fact that the QPP rates may change if the loop rate changes does not affect the rates for loops set by the Commission. Absent a finding that the QPP Agreement contains terms for provisioning a Section 251 service, the Section 252 filing requirement does not apply.

The ROO also relies on the provision in the QPP Agreement establishing that if a regulatory body rejects or modifies material provisions of the QPP Agreement, the parties may terminate the Agreement or the interconnection agreement and amendment. ROO at ¶ 9. However, this right of termination in the QPP Agreement does not affect the terms and conditions under which Qwest actually provides Section 251 elements through the ICA and the amendment and thus does not establish that the agreements are inseverable. In sum, the parties' intent governs whether two written instruments should treated as one. Here, Qwest and MCI intended to enter into two separate agreements consistent with the different regulatory schemes that govern Section 251 UNEs and Section 271 network elements.

C. The Recommended Opinion and Order Does Not Recognize The Critical Legal Distinctions Between Network Elements Provided Under Section 271 And Unbundled Network Elements Provided Under Section 251.

The ROO asserts without analysis that "as long as the incumbent LEC has agreed to provide network elements *or their functional equivalent* the agreement must be filed with the state commission for approval." ROO at ¶ 11 (emphasis added). Although it is unclear from the Order, this unexplained conclusion appears to be based upon the assumption that for purposes of a filing requirement, there is no distinction between network elements that a BOC provides under

Section 271 and UNEs that an ILEC must provide under Section 251 – they are the "functional equivalent" of each other.

However, Section 271 elements indisputably are not provided pursuant to any ongoing obligation relating to either Section 251(b) or (c) and, therefore, providing them cannot trigger the Section 252 review process. Indeed, there are fundamental differences between Section 251 UNEs and Section 271 network elements – differences that result in a significantly higher level of regulation for the former than the latter.

As discussed above, the only network elements an ILEC is required to provide under Section 251(c)(3) are those that meet the "impairment" standard in that section. Congress determined that without access to certain ILEC network elements under interconnection agreements approved by state commissions, CLECs would be impaired in attempting to compete. Accordingly, ILECs are only required to provide "*unbundled* network elements" if there is an FCC finding of impairment and must do so via interconnection agreements that contain cost-based rates. The corollary is that if the FCC determines that CLECs are not be impaired without access to certain network elements, ILECs cannot be compelled to provide them under the regulatory scheme imposed by Sections 251 and 252. A finding of non-impairment means that CLECs can compete effectively in a market without having access to an element from an ILEC under the highly regulated terms imposed by the Section 251/252 framework.[40] RBOCs must still provide some of these non-251 elements if they are listed in Section 271, such as switching and transport, but the terms for that access are largely dictated by the market.[41] Thus, there is no requirement in Section 271 for RBOCs to provide the network elements included exclusively in that section at cost-based rates and, significantly, no requirement to include them in interconnection agreements that are subject to review and approval by state commissions.

By requiring submission of the Agreement for approval, the ROO improperly applies the regulatory scheme reserved for Section 251 UNEs to Section 271 network elements that Congress expressly exempted from that scheme. The FCC's determinations that CLECs are not impaired

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[40] *TRRO*, ¶ 29.

[41] *See, e.g., TRO*, ¶ 656.

without access to switching and transport under the terms required by Sections 251 and 252 removed those elements from that regulatory framework (*i.e.*, they are no longer required UNEs). The ROO incorrectly attempts to reimpose that framework by subjecting the terms and conditions, including prices, of access to those elements to Commission scrutiny. As the FCC stated in a similar context, applying the Section 251/252 regulatory requirements to Section 271 network elements that have been removed from Section 251 "gratuitously reimpose[s] the very same requirements that [Section 251] has eliminated."[42]

The ROO's imposition of an approval process for commercial agreements involving network elements that the FCC has removed from Section 251 also conflicts directly with the Act's deregulatory objectives. Congress sought in the 1996 Act "to reduce the need for regulation in the presence of competition."[43] Thus, the FCC has characterized its filing standard as recognizing "the statutory balance between the rights of competitive LECs to obtain interconnection terms . . . and *removing unnecessary regulatory impediments to commercial relations* between incumbent and competitive LECs."[44] By requiring Qwest and MCI to submit the Agreement for approval, the ROO would continue to impose "unnecessary regulatory impediments" on commercial relations involving switching and transport despite the FCC's removal of those elements from the Section 251/252 regulatory framework and its determination that application of that framework is no longer necessary to competition. In other words, in violation of Congress's command, the ROO would continue to impose a form of regulation on switching and transport that the FCC has found is no longer supported by competitive market conditions.

D. The Recommended Opinion And Order Concludes Incorrectly That Commercial Agreements Involving Section 271 Elements Will Not Be Subject To Regulatory Review Unless State Commissions Assert Jurisdiction.

The ROO expressly does not reach the issue of whether "the QPP Agreement must be

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[42] *TRO*, ¶ 659.

[43] *TRO*, ¶ 1.

[44] *Declaratory Order*, ¶ 8.

filed under the Section 271 requirements" (ROO at ¶ 12), but it does conclude that "there is no separate review and approval process" for agreements covered by Section 271. *Id.* Based on this conclusion, the ROO states that it must therefore "be presumed that the review of [Section 271] agreements was intended to occur within the context of the state commissions' Section 252 review process. *Id.* This conclusion is incorrect for two independent reasons.

First, the ROO's presumption of state authority over Section 271 agreements ignores the fact that FCC has authority over the terms and conditions under which RBOCs provide Section 271 elements. Sections 201(b) and 202(a) (original provisions of the 1934 Communications Act) prohibit carriers from using "charges" and "classifications" or engaging in "practices" that are discriminatory, unjust, or unreasonable, and Section 208 gives the FCC jurisdiction to enforce these prohibitions. The FCC has confirmed that Sections 201(b) and 202(a), including 202(a)'s prohibition against discrimination, apply when RBOCs provide network elements under Section 271.[45] Thus, contrary to the ALJ's conclusion, there is a process for the FCC to review an RBOC's provisioning of Section 271 elements, and, hence, there is no basis for "presuming" that state commissions have that authority.

Second, Section 271 does not confer upon state commissions any review and approval or other decision-making authority over section 271 elements. With the passage of the Act, Congress and the FCC took over the regulation of local telephone service, leaving the states only with authority that Congress expressly granted. Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress."[46] A plain reading of the Act shows that Congress did not authorize any decision-making role for state commissions in connection with the Section 271 elements that are the subject of the QPP Agreement.[47]

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[45] *See TRO* ¶663.

[46] *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania,* 271 F.3d 491, 510 (3rd Cir. 2001).

[47] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by Section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004).

The ROO alludes to, but does not cite, Section 271(c)(2)(A)(i), which addresses one of the requirements a BOC must meet to obtain entry into the long distance market. ROO at ¶ 12. A BOC can satisfy that section by "providing access and interconnection pursuant to one or more binding agreements" approved under Section 252. The ROO suggests that this provision gives state commissions the authority to approve terms relating to elements provided under Section 271. *Id.* However, Section 271(c)(1)(A) refers expressly to "agreements that have been approved *under section 252*," making it clear that the agreements referred to in that section are those that relate to Section 252 – not Section 271 – obligations. Because the scope of Section 252 agreements is limited to terms relating to Section 251(b) and (c) the obligations, the reference in Section 271(c)(1)(A) to agreements "approved under section 252" is limited to agreements that address those obligations. The reference does not include agreements that address issues unrelated to those sections and therefore does not confer authority to review agreements involving Section 271 elements.[48]

The suggestion that states have authority over Section 271 agreements also is contradicted by the Act's provisions that define the authority of state commissions to approve interconnection agreements. Section 252(e)(1) authorizes state commissions to approve interconnection agreements "adopted by negotiation;" the negotiations to which the section refers are those addressed in Section 251(c)(1), which expressly relate only to the Section 251(b) and (c) obligations.[49] Neither Section 251 nor 252 contains any mention of negotiations relating to non-251 obligations or of state authority to approve negotiated agreements addressing non-251 obligations.

This conclusion is further supported by Section 252(e)(6), which provides for judicial review of state commission determinations relating to interconnection agreements. That section limits judicial review to "whether the agreement . . . meets the requirements of section 251 and

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[48] Section 271(c)(1)(A) also does not impose any filing requirements for agreements.

[49] Section 251(c)(1) imposes on ILECs "[t]he duty to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of [section 251(b)] and this subsection."

this section." This limitation demonstrates that Congress did not intend that state commissions would make any determinations relating to agreements that address non-251 obligations.

Accordingly, state commissions do not have authority to review and approve commercial agreements, like the QPP Agreement, under which BOCs provide network elements pursuant to section 271.

E. The Recommended Opinion and Order Relies Incorrectly On The Definition Of "Network Element" In Section 153 of the Act.

The ROO states without explanation that the QPP Agreement "is subject to the Section 252 filing requirements because the agreement's terms specifically address prices to be paid for network elements under the definition set forth in 47 U.S.C. § 153 . . . ." ROO at ¶ 7. Although the ROO does not explain this reliance on Section 153, the definition of "network element" contained in that section has no relevance to the analysis of whether the QPP Agreement must be filed for approval under Section 252.

Section 153(29) defines a "network element" as follows:

> The term 'network element' means a facility or equipment used in the provision of telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of telecommunications service."

As is apparent from this language, this definition of "network element" is extremely broad. By its terms, it covers almost anything in a telecommunications network, including network elements that an ILEC is not required to provide under Section 251.

Because the Section 252 filing requirement is expressly linked to UNEs that ILECs must provide under Section 251 – as distinct from non-251 elements that ILECs provide – the broad definition in Section 153(29) is irrelevant in determining whether an agreement involving network elements must be submitted for review and approval. In the *Declaratory Order*, the FCC expressly used the term "unbundled" network element in defining the filing standard and did not use or refer to the definition of "network element" in Section 153(29).[50] The use of that term

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[50] *Declaratory Order* at ¶ 8.

points directly to Section 251(c)(3), not to Section 153(29), because it is Section 251(c)(3) that addresses an ILEC's duty to provide "access to network elements on an *unbundled* basis." (Emphasis added).

As discussed above, Section 251(d)(2)(B) requires that network elements need to be made available on an unbundled basis *only* if "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that its seeks to offer."[51] Because the QPP Agreement relates only to the provision of the switching and transport network elements that are no longer required by Section 251(c)(3), the Agreement is not subject to the Commission's review and approval.

F. The ROO Relies On An Improper Application Of State Law As A Basis For Imposing The Filing Requirement.

The ROO concludes that under the Commission's rules (specifically, A.A.C. R14-2-102, A.A.C. R14-2-1302, and A.A.C. R14-2-1506(A)), the QPP Agreement is an "interconnection agreement" that must submitted to the Commission for review and approval. ROO at ¶ 13. Under this application of the Commission's rules, it is irrelevant whether the QPP Agreement includes any ongoing obligations under Sections 251(b) or (c). It is enough to trigger the state-imposed filing requirement, according to the ROO, if an agreement is a "formal agreement between any telecommunications carriers providing or intending to provide telecommunications services in Arizona . . . ." ROO at ¶ 13 (quoting A.A.C. R14-2-1502. Because this application of the Commission's rules conflicts with the filing standard established by the Act and the *Declaratory Order*, it is unlawful.

In transferring the regulation of local telecommunications from the states to the federal government by passing the 1996 Act, Congress preserved independent state authority only to the extent that authority is exercised in a manner consistent with the Act and federal policies. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the

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[51] 47 U.S.C. § 251(d)(2)(B) (Emphasis added).

requirements of this section." Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act. These savings clauses thus do not do not give state commissions authority to adopt or enforce under state law rules and regulations that conflict with provisions of the Act, the FCC's rules and orders implementing the Act, or the federal policies underlying the Act. Indeed, the Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law."[52]

Here, the filing requirement that the ROO attempts to impose under state law clearly conflicts with the FCC's determination that carriers are only required to file for approval agreements containing ongoing obligations under Sections 251(b) and (c). Equally important, the state-imposed requirement conflicts with the federal policy of moving toward a deregulatory, market-driven system, particularly in connection with network elements for which there is no impairment-based unbundling requirement. Congress's goals in passing the Act were not just pro-competitive; they were also deregulatory. Congress contemplated a system where the markets, not regulators, governed the delivery of telecommunications services. For example, Congress expressed the goal of simultaneously moving to a "*pro-competitive, deregulatory system*" to replace the heavily regulated environment.[53] In other words, Congress mandated a telecommunications industry in which regulation takes a back seat to the marketplace and, in particular, to arms-length commercial transactions and consensual, privately-negotiated

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[52] *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

[53] It is clear from the legislative history that the "goals of the Act were to provide for a *pro-competitive, deregulatory national framework* 'designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to technology . . . .'" *Id.* ¶ 62 n.198, quoting Joint Manager's Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Conference Report)(emphasis added).

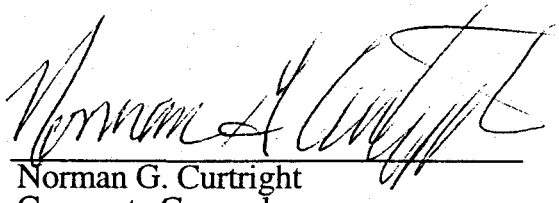
agreements like the QPP Agreement.[54]

For these reasons, the state-imposed filing and approval requirement in the ROO is unlawful.

IV. CONCLUSION

For the reasons stated, the Commission should grant these exceptions and not accept the ROO. The Commission should issue an order granting Qwest's motion to dismiss and establishing that the QPP Agreement is not subject to the Commission's review and approval.

QWEST CORPORATION

By: 

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[54] While the Act requires carriers to enter into "interconnection agreements" that set forth the terms and conditions for interconnecting their networks and for the leasing of network elements by competitive local exchange carriers ("CLECs") from incumbent local exchange carriers ("ILECs"), Congress has established a preference for negotiated interconnection agreements instead of agreements imposed by regulatory fiat. Thus, even where regulatory mandates still govern, they are designed to mimic conditions in the competitive marketplace. *See, e.g.*, 47 U.S.C. § 252(a).

Original and 15 copies filed this 7th day of July, 2005, with:

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EXHIBIT A

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer		Chair
Marshall Johnson		Commissioner
Ken Nickolai		Commissioner
Thomas Pugh	MAY 19	Commissioner
Phyllis A. Reha		Commissioner

In the Matter of Qwest Corporation and MCImetro Access Transmission Services Amendment to Interconnection Agreement

ISSUE DATE: May 18, 2005

DOCKET NO. P-5321, 421/IC-04-1178

ORDER AFTER RECONSIDERATION RELEASING MASTER SERVICE AGREEMENT FROM APPROVAL REVIEW, REQUIRING AMENDMENT TO INTERCONNECTION AGREEMENT, AND REQUIRING SUBMISSION OF FUTURE COMMERCIAL AGREEMENTS

PROCEDURAL HISTORY

On December 2, 2004, the Commission issued its ORDER APPROVING AMENDMENT, DENYING MOTION TO DISMISS AND REJECTING MASTER SERVICE AGREEMENT in this matter.

On December 23, 2004, MCImetro Access Transmission Services LLC (MCImetro) filed a Petition for Reconsideration seeking approval of its Master Service Agreement (MS Agreement) with Qwest Corporation (Qwest) without the modifications required by the Commission's December 2, 2004 Order.

On December 30, 2004, Qwest filed a Reply to MCI's Petition for Reconsideration.

On January 13, 2005, the Commission granted the Department of Commerce's (the Department's request to extend the reply comment period to allow parties to submit supplemental briefs regarding obligations under the Telecommunications Act of 1996 after the Federal Communications Commission (FCC) released its Triennial Review Remand Order (TRRO).

On February 24, 2005, the Department filed its reply comments and a Joinder of MCI's Petition for Reconsideration, Qwest filed Reply Comments, and MCI filed Supplemental Comments.

The Commission met on April 7, 2005 to hear oral argument from the parties on this matter and on April 14, 2005 to deliberate this matter.

FINDINGS AND CONCLUSIONS

I. Commission Approval of Master Service Agreement is Not Required Under Federal Law

A. Background

In its December 2, 2004 Order, the Commission found that § 252(a) of the Federal Telecommunications Act required the Master Service Agreement between Qwest and MCImetro to be filed with the Commission for approval or rejection. The Commission did so for several reasons, including: 1) that the FCC's Declaratory Order (October 4, 2002) listed a number of types of agreements that must be filed pursuant to § 252(a)(1), including agreements like the MS Agreement that deal with "interconnection, services, or network elements"; 2) the Act does not distinguish between agreements to provide mandatory network elements and agreements to provide "other" network elements; and 3) its view that a plain reading of the Act, therefore, required the MS Agreement, a negotiated agreement to provide network elements (switching and transport), to be filed for approval with the Commission.

B. Summary of Decision After Reconsideration

On reconsideration, having read the parties' comments and heard their oral arguments, the Commission is persuaded by the Department and Qwest that because the MS Agreement does not relate to elements or services mandated under § 251, § 252(a) does not require that it be formally approved.

C. Commission Analysis

It its initial Order, the Commission was guided by the apparently clear language of § 252(e) to conclude that Commission review and approval of **any** interconnection agreement was required. Section 252(e) states in relevant part:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.[1]

The Commission rejected the notion that because the parties had characterized this agreement as a "commercial agreement" that it was exempt from Commission review and approval as an interconnection agreement. Finding that the Master Service Agreement was in essence an interconnection agreement, the Commission concluded that it was subject to Commission review for approval as stated in § 252 (e).

The Commission continues to believe that a document's nature, rather than the label or characterization given it by the parties, controls how it is to be treated under the Act. The Commission also continues to view the MS Agreement as an interconnection agreement since it involves the provision of network elements. However, the Commission is persuaded that the term "interconnection agreement" *as used in § 252(e)* is to be understood in relationship to § 252(a). Section 252(a) requires an interconnection agreement to be submitted to State commissions under subsection (e) only if the agreement results from a request for interconnection, services, or network elements "pursuant to section 251".

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[1] 47 U.S.C. § 252(e)(1).

In short, there appear to be different kinds of interconnection agreements: 1) those that contain § 251 network elements and are therefore interconnection agreements within the meaning of § 252(e) and 2) those that contain network elements but do not contain § 251 network elements and therefore are not "interconnection agreements" within the meaning of § 252(e). The first kind of interconnection agreement (those that contain § 251 network elements) must be submitted to the Commission for approval or rejection pursuant to § 252(e). The second kind of interconnection agreement (those that do not contain § 251 network elements) need not be approved or rejected by the Commission pursuant to § 252(e).

Whether §§ 252(a) and (e) require the MS Agreement to be submitted to the Commission for approval, therefore, depends not simply on whether the agreement is an interconnection agreement as stated by the Commission in the December 2, 2004 Order, but on whether the MS Agreement fulfills § 251 obligations (interconnection, services, and network elements required to be provided by § 251.)

Even under this corrected view of when Commission approval is required, the Commission's December 2, 2004 Order properly found that the MS Agreement was in fact required to be submitted to the Commission for approval because the MS Agreement provided certain network elements that, *as of that time*, were identified by the FCC as § 251 network elements, i.e., were required to be provided on an unbundled basis by § 251.[2]

Subsequently, however, the FCC issued a news release (December 15, 2004) and an order on February 4, 2005 clarifying that certain network elements earlier identified as § 251 network elements (mass market local switching and local transport) were not § 251 network elements.[3]

Following the FCC's February 4, 2005 Order, the Department joined MCI's request for reconsideration, analyzing the network elements provided per the MS Agreement (i.e., local switching, shared transport, access to call-related databases, and billing information) and advising that in light of the FCC's February 4, 2005 Order none of the network elements provided by the MS Agreement continued to be required per § 251.[4] No party objected to the Department's analysis on this point. No party continued to contend that the MS Agreement provides network elements required to be provided by § 251.

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[2] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 6783, 16785-87, paras. 3-7 (August 20, 2004) ("*Interim Order*").

[3] See FCC Press Release entitled FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, December 15, 2004 and *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order on Remand, (released February 4, 2005) ("Triennial Review Remand Order").

[4] See Department's February 24, 2005 Reply to and Joinder of MCI's Motion for Reconsideration and Supplemental Briefing, pages 16-17.

In short: this Order focuses on an agreement that contains network elements but which the Commission has now found does not concern provision of a network element required by § 251. Nor has any party asserted that the agreement contains any other obligation under § 251 (b) and (c). Because the MS Agreement does not contain an obligation under § 251 (b) or (c), therefore, Section 252 does not require that it be approved or rejected by the Commission.

D. Commission Action

Based on the new understanding of the requirements of §§ 251 and 252 with respect to interconnection agreements (see above), the FCC *Triennial Review Remand Order* clarifying the non-§ 251 status of certain network elements, and the Department's examination of the network elements provided by the MS Agreement, therefore, the Commission concludes that the Telecommunications Act of 1996 does not require the MS Agreement to by approved by the Commission.[5]

II. The Parties' Amended Interconnection Agreement Must be Further Amended

A. Introduction

In its December 2, 2004 Order, the Commission addressed two documents submitted by MCImetro: 1) an amended Interconnection Agreement (ICA) between Qwest and MCImetro; and 2) the parties' Master Service Agreement. The previous section of this Order (Section I) addressed the Master Service Agreement. This section (Section II) addresses the parties' amended ICA.

B. Background

In comments submitted prior to the December 2, 2004 Order, the Department noted that neither the Master Service Agreement nor the amended Interconnection Agreement (ICA) contained language on six topics that the Commission has consistently required in recent interconnection agreements. Nevertheless, the Department recommended and the Commission agreed to approve the parties' amended ICA as submitted because the underlying ICA had been adopted by the parties and approved by the Commission before the Commission had begun requiring the language in question and the Commission's practice has been to "grandfather" the prior generation ICAs, i.e. to allow them to be amended and/or renewed without requiring the new language required in new ICAs.

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[5] In its February 24, 2005 comments joining Qwest's request for reconsideration, the Department acknowledged that before the Commission's December 2, 2004 Order, the Department had argued that the MS Agreement was an interconnection agreement that was properly before the Commission for approval pursuant to § 252(e). The Department clarified, however, that it had done so based on the FCC's Interim Order which had identified two network elements provided per the MS Agreement as § 251 elements. The Department argued that the FCC's subsequently issued Triennial Review Remand Order (February 4, 2005) removed from Qwest any § 251 obligation to provide the network elements covered by the MS Agreement and, hence, any requirement that the Commission review the MS agreement for approval.

C. Commission Analysis and Action

This approach to the parties' amended ICA was reasonable since both the Department and the Commission viewed the parties' Master Service Agreement as a new interconnection agreement subject to Commission approval. As such, the Master Service Agreement was subject to the Commission's requirement that the specific language on six topics identified by the Department be added to it.

As discussed in the previous section, the Commission has now determined after reconsideration that the MS Agreement does not require Commission approval. As a consequence, the Commission's directive that the specific language on six topics identified by the Department be added to the Master Service Agreement as a condition of approval no longer applies.

At the hearing on reconsideration, MCImetro and Qwest agreed to add the language identified by the Department to their amended ICA. In light of the parties' agreement, the Commission need not analyze the issue further and will simply direct the parties to implement what the parties have agreed to before the Commission on this point.

III. All Future Commercial Agreements Must be Submitted for Threshold Determination

A. Introduction

This case has focused on whether the parties' commercial agreement (their MS Agreement) is an interconnection agreement within the meaning of Section 252(a) and the Commission has found that it is not.

This section of the Order addresses a further question: whether the Commission has authority to require the parties to file future agreements that they assert are "commercial agreements"[6] so the Commission can make the threshold determination whether or not the agreement in question is in fact a "commercial agreement". i.e. an agreement that is not subject to Commission approval pursuant to § 252(e).

B. Commission Analysis

Based on the following analysis, the Commission concludes that it has authority to require and should require the parties to submit all their commercial agreements for Commission review of a threshold question: whether the agreement is subject to Commission approval or rejection pursuant to § 252(e).

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[6] The term "commercial agreement" is based on the FCC's encouragement that local exchange carriers (LECs) and competing local exchange carriers (CLECs) negotiate "commercially acceptable arrangements for the availability of unbundled network elements". When used in this Order, therefore, the term will be given that meaning: "a commercially acceptable arrangements for the availability of unbundled network elements". See the FCC's "Press Statement of Commissioners Powell, Abernathy, Copps, Martin and Adelstein On Triennial Review Next Steps" (March 31, 2004).

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded several of the rules that the FCC established in its Triennial Review Order regarding unbundled network elements.[7] Subsequently, citing the unsettled state of the law regarding unbundled network elements resulting from that decision, the FCC encouraged all telecommunications providers to voluntarily negotiate "commercially acceptable agreements for the availability of unbundled network elements" without awaiting final resolution of all parties' legal obligations.[8]

Qwest has argued that by encouraging parties to negotiate "commercially acceptable agreements" the FCC was indicating that the agreements resulting from such negotiations are not to be subject to state commission review for approval. Further, while agreeing for the present to provide these agreements to the Commission for informational purposes, Qwest apparently believes that the Commission should allow parties to decide whether their agreement is a "commercial agreement" and hence not subject to Commission review and approval under § 252. The Commission does not adopt that approach.

State commissions draw their federal responsibilities in this regard from the Act. Section I of this Order focused on the fact that the Commission's review of interconnection agreements for approval under § 252(e) is limited to interconnection agreements that contain § 251 obligations, but a correlative of that finding is also true: the Commission does have authority and an obligation under the Act to review for approval interconnection agreements that do contain § 251 obligations.

In this Order, the term "commercial agreement"refers to "a commercially acceptable arrangements for the availability of unbundled network elements".[9] However, since the term "commercial agreement" is not used (let alone defined) in the Act, the Commission finds it clearer to delineate its responsibilities and parties' responsibilities with respect to agreements as the Commission has done in this Order, i.e. in terms of whether an agreement involves ongoing obligations under §§ 251(b) and (c). If the agreement does not concern § 251 obligations, the Commission has no obligation or authority under the Act to review it for approval. If it does involve § 251 obligations, however, the Commission has an obligation under federal law to review it for approval.

The FCC has recognized the states' role and authority in this area. The FCC has stated:

> Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected. . . . The statute expressly contemplates that the section 252 filing processes will occur with the states, and we are reluctant to interfere with their processes in this area. . . . We encourage state

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[7] *United States Telecom Association v. FCC*, 359 F.3d 554, 571, 574 (D.C. Cir. 2004).

[8] See the FCC's "Press Statement of Commissioners Powell, Abernathy, Copps, Martin and Adelstein On Triennial Review Next Steps" (March 31, 2004).

[9] See Footnote 8, supra.

commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval.[10]

To make sure it is properly discharging its responsibility under § 252(e) of the Act to review for approval agreements that contain § 251 obligations, the Commission must review the parties' commercial agreements to determine whether the agreement in question addresses any § 251 obligations. Since the Commission is responsible under the Act to determine whether parties' agreements involve any § 251 obligation and assess it accordingly, it has authority under the Act to require parties to submit their commercial agreements regardless of how the parties label or characterize their agreement.[11]

C. Relationship of This Order to the *Covad* Order

This Order rules that the Commission has authority to require and will require the parties to submit all their commercial agreements (commercially acceptable arrangements for the availability of unbundled network elements[12]) for Commission to decide a threshold question: whether the agreement is subject to Commission approval or rejection pursuant to § 252(e).

This decision is consistent with the Commission's September 27, 2004 Order in Docket No. P-5692, 421/CI-04-804 (*Covad* Order)[13] which states in part:

> . . . the Commission is persuaded of the merits of directing Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute "interconnection agreements" for purposes of the 1996 Act. Specifically, the Commission will direct Qwest to file agreements that –

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[10] *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) at ¶10.

[11] The Commission clarifies that this Order addresses the extent of Commission authority and responsibility under relevant federal law, the Telecommunications Act of 1996 and does not address the Commission's authority under applicable state law to review these agreements.

[12] See Footnote 6, supra.

[13] See *In the Matter of a Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad*, Docket No. P-5692, 421/CI-04-804, ORDER DIRECTING QWEST TO FILE COMMERCIAL AGREEMENTS (September 27, 2004) (the Covad Order). Note that the Commission has issued an ORDER AFTER RECONSIDERATION ON ITS OWN MOTION (May ___, 2005) affirming the *Covad* Order on all substantial points and simply clarifying, consistent with its determination in Section I of the current Order, that the Commission's approach under federal law will be to review the parties' agreement to determine whether, based on a finding that the agreement provides § 251 elements, further review is required rather than to proceed automatically to review the agreement for approval under § 252.

- are associated with **elements of Qwest's network,**
- make reference to unbundled **network elements** (UNEs),
- reflect a § 271 obligation, or
- reflect a state obligation.[14]

(Emphasis added.)

The current Order neither expands nor reduces the kinds of agreements that must be submitted pursuant to the *Covad* Order.[15] Instead, because this Order deals with an agreement containing network elements, it clarifies the type of review that the Commission will give such an agreement, i.e. a threshold determination whether any of the network elements provided under the agreement are § 251 network elements and hence must be further reviewed under § 252(e) for approval. Seen in context, then, the MS Agreement is part of a subset of the agreements that are reviewable under federal law to determine the threshold issue (whether they address obligations under § 251 (b) and (c)) but which are not ultimately required to be approved or rejected pursuant to § 252.

D. Commission Action

Accordingly, in exercise of its authority under the Federal Telecommunications Act of 1996 (§ 252(e)), the Commission will require Qwest to submit future commercial agreements ("commercially acceptable arrangements for the availability of unbundled network elements") to the Commission so that the Commission can make the threshold determination whether the agreement contains § 251 network elements and hence must be further reviewed under § 252(e) for approval or whether the agreement contains no § 251 obligations and therefore warrants no further action by the Commission under § 252(e).

ORDER

1. The Commission finds that federal law does not require the Commission to review and approve the Master Service Agreement in this matter because it contains no § 251 network elements.

2. Within two weeks of this Order, Qwest and MCImetro shall file a revised Interconnection Agreement Amendment incorporating in that document the language identified by the Commission in its December 2, 2004 Order in this matter (pages 10-14).

3. In addition to the agreements that Qwest believes it is required by federal law to submit to the Commission for review and approval because they contain § 251 network elements or other § 251 obligations, Qwest shall also submit to the Commission and the Department future agreements that it believes are strictly commercial agreements, not subject to Commission review for approval or rejection pursuant to § 251.

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[14] *Covad* Order at page 6.

[15] The Commission clarifies that the current Order addresses the extent of Commission authority and responsibility under relevant federal law, the Telecommunications Act of 1996, and does not address the Commission's review authority under applicable state law, including Minn. Stat. Chapter 237, which the *Covad* Order references in speaking of agreements that "reflect a state obligation." *Covad* Order at page 6.

4. The Commission will review an agreement submitted pursuant to Order Paragraph 3 to determine whether the agreement in fact contains no § 251 obligation. If the Commission determines that the agreement contains a § 251 obligation, the Commission will proceed to review the agreement for approval as required by § 252(e) of the Federal Telecommunications Act of 1996. If the Commission determines that the agreement does not contain § 251 obligations, no Commission review and approval will be required under federal law and the Commission will take no further action regarding the agreement under federal law.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

QWEST CORPORATION, a Colorado corporation, Plaintiff, vs. THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Montana, Defendants.	CV-04-053-H-CSO **ORDER ON QWEST'S MOTION FOR JUDGMENT ON APPEAL**

Plaintiff Qwest Corporation ("Qwest") initiated this action seeking declaratory and injunctive relief against the Montana Public Service Commission ("PSC") and the PSC Commissioners in

their official capacities. Qwest challenges a PSC order concerning an agreement between Qwest and DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"). Qwest generally alleges that the PSC exceeded its authority under the Federal Telecommunications Act of 1996 ("FTA") by requiring Qwest to file the agreement, and by ordering a substantive change to its terms and conditions.[1]

In seeking federal judicial review of the PSC's decision, Qwest relies upon 47 U.S.C. § 252(e)(6) of the FTA,[2] and relies upon that provision and 28 U.S.C. § 1331 in invoking the Court's jurisdiction.[3] By Order filed February 22, 2005, Chief Judge Molloy, with the parties' consent, assigned this case to the undersigned for all purposes.[4]

Before the Court is Qwest's Motion for Judgment on Appeal.[5]

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[1]Complaint ("Cmplt.") (Court's Doc. No. 1) at 1, 12-23.

[2]Id. at 3. 47 U.S.C. § 252(e)(6) provides, in relevant part:

> (e) Approval by State commission
>
> * * *
>
> (6) Review of State commission actions
>
> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

[3]Cmplt. at 3.

[4]Court's Doc. No. 28.

[5]Plaintiff Qwest Corporation's Motion for Judgment on Appeal ("Qwest's Mtn.") (Court's Doc. No. 31).

On June 1, 2005, following submission of the parties' briefs,[6] the Court heard oral argument on Qwest's motion. Having reviewed the record, and having considered the parties' arguments, the Court is prepared to rule.

I. THE TELECOMMUNICATIONS ACT OF 1996.

"Congress passed the [FTA] to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunications services."[7] To accomplish this objective, Congress, through the FTA, changed significantly the regulatory scheme that governed local telephone service. The FTA "restructured local telephone markets by eliminating state-granted local service monopolies," and replaced exclusive state regulation of local monopolies with a competitive scheme set forth in 47 U.S.C. §§ 251 and 252.[8]

The FTA, under sections 251 and 252,[9] requires established

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[6]On March 2, 2005, Qwest filed Qwest Corporation's Opening Brief in Support of Judgment on Appeal ("Qwest's Opening Brief"). On April 29, 2005, Defendants filed their Response Brief of Defendants Montana Public Service Commission and Bob Rowe, Thomas J. Schneider, Matt Brainard, Jay Stovall and Greg Jergeson ("PSC's Brief") (Court's Doc. No. 34). On May 17, 2005, Qwest filed Qwest Corporation's Reply Brief in Support of Judgment on Appeal ("Qwest's Reply") (Court's Doc. No. 35).

[7]Pacific Bell v. Pac-West Telecomm:, Inc., 325 F.3d 1114, 1117-18 (9th Cir. 2003) (citations and footnotes omitted).

[8]MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 498 (3d Cir. 2001)("MCI Telecomm.")(citing AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 370 (1999) ("Iowa Util.")).

[9]Hereafter, all references to code sections are to sections of Title 47 of the United States Code unless otherwise indicated.

incumbent local exchange carriers ("ILECs") (defined in 47 U.S.C. § 251(h)(1)) to allow competitive local exchange carriers ("CLECs") access to the ILECs' existing networks or services to permit the CLECs to compete in providing local telephone services.[10]

Generally, both ILECs and CLECs have the duty under section 251(a) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]"[11] Sections 251 and 252 also set forth specific requirements.

Section 251(b) imposes requirements on both ILECs and CLECs. It requires them to: (1) allow resale of their telecommunications services; (2) provide number portability; (3) provide dialing parity; (4) provide access to rights-of-way; and (5) establish reciprocal compensation arrangements.[12]

Section 251(c) imposes requirements applicable only to ILECs. It requires ILECs to: (1) provide interconnection of the ILEC's network to other networks; (2) provide access to unbundled network elements ("UNEs")[13]; (3) allow CLECs to resell services at wholesale rates; and (4) provide for collocation of CLEC

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[10]Pacific Bell, 325 F.3d at 1118; see also US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1116 (9th Cir. 1999).

[11]Section 251(a)(1).

[12]Sections 251(b)(1)-(5).

[13]UNEs are discrete components of an existing ILEC's network. US West Communications v. Jennings, 304 F.3d 950, 954 (9th Cir. 2002).

equipment in ILEC buildings.[14] Also, section 251(c)(1) requires ILECs to "negotiate in good faith" the "terms and conditions of agreements" that permit CLECs to share the network and to provide service.[15]

Section 252 governs the process for establishing interconnection agreements between ILECs and CLECs, and provides that negotiated or arbitrated interconnection agreements must be submitted to state public utility commissions for approval. Section 252 provides, in relevant part, as follows:

> (a) Agreements arrived at through negotiation
>
> (1) Voluntary negotiations
>
> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.
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> * * *
>
> (e) Approval by State commission
>
> (1) Approval required

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[14]Sections 251(c)(2)-(4) and (6).

[15]Section 251(c)(1).

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[16]

Congress empowered the Federal Communications Commission ("FCC") to promulgate regulations to implement the FTA's requirements.[17] "[T]he FCC's implementing regulations ... must be considered part and parcel of the requirements of the [FTA]."[18]

II. BACKGROUND.

The parties do not dispute the underlying facts.[19] Under the FTA, Qwest is an ILEC and Covad is a CLEC. In early 2004, Qwest and Covad successfully negotiated a line-sharing agreement.[20] Line sharing involves simultaneous use of both the high frequency and low frequency portions of the copper wire or "loop" that connects an end user to a telecommunications network.[21] Companies like Qwest provide high-speed access to the Internet through a service known as a Digital Subscriber Line

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[16]Sections 252(a)(1) and 252(e)(1).

[17]Section 251(d)(1); Iowa Util., 525 U.S. at 384.

[18]Jennings, 304 F.3d at 957.

[19]See Qwest's Preliminary Pretrial Statement (Court's Doc. No. 23) at 2; Preliminary Pretrial Statement of Defendants (Court's Doc. No. 22) at 3.

[20]Complaint Exhibit ("Cmplt. ex.") 2; PSC's Brief at ex. 5.

[21]Qwest's Opening Brief at 14.

("DSL"). DSL service is provided by equipment that splits the frequency of the loop, allowing simultaneous use of the high frequency portion for connection to the Internet, and the low frequency portion for voice communications. The line sharing agreement between Qwest and Covad gives Covad access to line sharing in Qwest's 14-state region for a period that commenced on October 2, 2004.[22]

On May 19, 2004, Qwest and Covad filed with the PSC their agreement, which is titled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Commercial Line Sharing Agreement" or "CLSA").[23] In a separate letter,[24] Qwest informed the PSC that it filed the agreement "for informational purposes only," and that it was not filing the agreement for approval under section 252's requirement that agreements be submitted to state commissions for approval.

On June 3, 2004, the PSC issued an Order to Show Cause and Request for Information[25] directing Qwest and Covad, and allowing any interested parties, to comment about why the CLSA should not be filed and considered by the PSC under sections 251 and 252.

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[22]Id. at 18.

[23]Cmplt. ex. 2.

[24]Cmplt. ex. 1.

[25]Cmplt. ex. 3.

On June 18, 2004, Qwest, Covad and others filed comments.[26]

On July 9, 2004, the PSC entered a Notice of Application for Approval of Commercial Line Sharing Agreement for DSL Services ("Notice").[27] In the Notice, the PSC concluded that the CLSA "is a negotiated agreement pursuant to §§ 251 and 252 of the [FTA,]" stated that it requires PSC approval prior to implementation and set a procedural schedule for considering whether to approve or reject the CLSA. On July 28, 2004, Qwest filed with the PSC a Motion for Reconsideration and to Dismiss.[28]

On September 22, 2004, the PSC issued its Final Order and Order on Reconsideration ("Final Order").[29] The PSC approved the CLSA with the exception of one provision that dealt with the timing of notice required before disconnection of services.

On October 21, 2004, Qwest filed the instant action.[30] Qwest seeks: (1) a declaratory ruling that the Final Order violates section 252; and (2) entry of a permanent injunction to prevent the PSC from enforcing the Final Order against Qwest with

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[26]Cmplt. exs. 4 (Qwest's comments), 5 (Covad's comments) and 6 (Qwest's reply comments). Other entities' comments are found in the Notice of Transmittal of Administrative Record (Court's Doc. No. 14).

[27]Cmplt. ex. 7.

[28]Cmplt. ex. 8.

[29]Cmplt. ex. 9.

[30]Cmplt. at 1.

respect to the CLSA.[31]

III. STANDARD OF REVIEW.

The Court must consider de novo the Montana PSC's interpretation of the FTA and of the FCC's implementing regulations.[32]

IV. DISCUSSION.

The narrow legal issue before the Court is whether the CLSA is an "interconnection agreement" that must be submitted to the PSC for approval under the FTA. The issue of whether the PSC may require agreements to be filed is not before the Court, and the Court takes no position herein on that issue.[33]

The parties agree that line sharing does not fall within the obligations of an ILEC as set forth in sections 251(b) and (c), *i.e.*, line sharing is not a UNE under section 251(c)(3).[34] The

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[31]Qwest's Opening Brief at 1; Cmplt. at 16-23.

[32]US West Communications v. MFS Intelenet, Inc., 193 F.3d at 1117 (citing Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997), for proposition that state agency's interpretation of a federal statute is considered de novo).

[33]See, e.g., Order Directing Qwest to File Commercial Agreements, In the Matter of the Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad, 2004 WL 2465819 (Minn. PUC, September 27, 2004)(Minnesota Public Utilities Commission directing "Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute 'interconnection agreements' for purposes of the [FTA]" noting, *inter alia*, that "[r]eviewing such agreements will provide the Commission with information about the evolution of competition in the state generally.").

[34]Counsel for the PSC conceded this point at oral argument. The PSC's concession is consistent with the FCC's determination that ILECs are not

parties disagree, however, with respect to the issue of whether the line sharing agreement between Qwest and Covad is nevertheless an interconnection agreement that must be submitted to the PSC for approval.

Qwest generally argues that it has no obligation to file any agreements that relate to services that it, as an ILEC, is not required to provide,[35] and that state commissions have no authority to impose requirements upon ILECs that the FTA does not impose. Qwest argues that the PSC, in taking action with respect to Qwest's CLSA with Covad, "improperly asserted authority over an agreement that does not address a section 251(b) or (c) service or element and hence is not an 'interconnection agreement' governed by that section of the [FTA]."[36]

It is Qwest's position that "[a] simple analysis of the interplay between sections 251 and 252 demonstrate[s] that there is no statutory basis to conclude that the [CLSA] must be filed."[37] Specifically, Qwest argues that there are only two

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required to provide line sharing as an unbundled network element under section 251(c)(3), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, ¶¶ 255, et seq. (2003) ("Triennial Review Order" or "TRO"), a conclusion that the D.C. Circuit Court of Appeals has expressly upheld. United States v. Telecom Ass'n v. FCC, 359 F.3d 554, 584-85 (D.C. Cir. 2004) ("USTA II").

[35]Qwest's Opening Brief at 7.

[36]Id. at 10.

[37]Id. at 24-25.

provisions of section 252 that discuss the obligation of parties to file agreements with state commissions, and neither requires submission of the CLSA to the PSC.

The first provision is section 252(a)(1). Qwest argues that the provision's requirement that an agreement be submitted to the state commission is expressly premised on the agreement being for services or elements provided "pursuant to section 251." Because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

The second provision is section 252(e)(1). As noted *supra*, it provides that any "interconnection agreement adopted by negotiation ... shall be submitted to the State commission." Qwest argues that the reference to agreements "adopted by negotiation" refers to section 252(a)(1) agreements which, as already discussed, relate only to services or elements provided pursuant to section 251. Again, because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

In sum, Qwest argues that because it and Covad were not obligated to submit their CLSA to the PSC for approval, the PSC exceeded its authority when it took action on the CLSA.

The PSC first argues that section 252's plain language

dictates that the CLSA must be submitted to it for approval.[38] The PSC argues that the purpose of section 252(a)(1)'s first sentence "is to reward carriers for independently contracting for interconnection and provisioning of goods and services" and to relieve them from the substantive requirements of sections 251(b) and (c).[39] The sentence, the PSC argues, does not relieve carriers entering voluntary agreements from submitting their agreements to the state commissions for approval. Also, the PSC argues that "[n]othing in section 252(e)(1) limits the filing requirement of interconnection agreements to those that implement duties contained in §§ 251(b) and (c)."[40]

Second, the PSC argues that FCC orders support its position that the CLSA must be submitted to it for approval. The PSC argues that the FCC, in its order on the scope of section 252(a)(1)'s requirement for submission of agreements to state commissions for approval, encouraged state commissions to decide in the first instance which sorts of agreements must be submitted.[41] The PSC argues that the FCC, in a subsequent order, "reiterated the role of state commissions in determining in the

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[38]PSC's Brief at 8-14.

[39]Id. at 9.

[40]Id. at 12.

[41]Id. at 14-18 (citing Memorandum Opinion and Order, In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 WL 31204893 (Oct. 4, 2002) ("Declaratory Order")).

first instance what interconnection agreements must be filed."[42]

Third, the PSC argues that the CLSA is subject to section 252's submission requirement because the networks of Qwest and Covad are physically linked. This physically linking, the PSC argues, makes the CLSA an "interconnection agreement" under section 251, and thus subject to submission to the PSC under section 252.

Fourth, the PSC argues that its interpretation of section 252 is entitled to the Court's deference under Chevron USA Inc. v. Natural Resources Defense Council, Inc.[43] The PSC argues that because its interpretation of section 252 is reasonable, the Court should afford that interpretation deference.

Finally, the PSC argues that section 252's requirement for submission of agreements is not limited to agreements that contain the FCC's current list of unbundled network elements. The PSC argues that it and other state commissions are permitted to expand the list of network elements that must be made available to CLECs "as long as state requirements are consistent with and do not substantially prevent implementation of § 251 and the purposes of the [FTA]."[44]

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[42]Id. (citing In the Matter of Qwest Corporation Apparent Liability for Forfeiture, File No. EB-03-IH-0263 (March 12, 2004)("NAL")).

[43]Id. at 22-26 (citing Chevron, 467 U.S. 837, 842-43 (1984)).

[44]Id. at 27.

Having considered all of the parties' arguments, the Court concludes that section 252's language limits the requirement that agreements be submitted to state commissions for approval to those agreements that contain section 251 obligations. Because line sharing, which is the subject of Qwest's CLSA with Covad, is not an element or service that must be provided under section 251, there is no obligation to submit the CLSA to the PSC for approval under section 252.

As Qwest argues, section 252(a)(1)'s requirement that an agreement be submitted to a state commission is expressly premised on the agreement being for interconnection, services or network elements provided "pursuant to section 251." Here, as the parties agree and as relevant authority establishes, line sharing is not a service or element provided pursuant to section 251. Therefore, Qwest's CLSA with Covad is not the type of agreement contemplated in section 252(a)(1) that must be submitted to the PSC for approval.

Similarly, section 252(e)(1) requires submission to the state commission any "interconnection agreement adopted by negotiation ...." The reference to any agreement "adopted by negotiation" refers to section 252(a)(1) agreements which, as noted, involve only those services provided "pursuant to section 251." Again, line sharing is not a service or element provided pursuant to section 251. Thus, the CLSA at issue is not an "interconnection agreement" as contemplated in section 252, and

thus need not be submitted to the PSC for approval. The PSC's argument that section 252's language dictates a contrary result is unpersuasive.

The Court believes that its conclusion that the CLSA at issue need not be submitted to the PSC for approval is consistent with the FCC's interpretation of the statute's language. In the Declaratory Order, the FCC expressly concluded that "only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[45] The PSC's argument that the FCC's orders support its position ignores the clear language of the Declaratory Order, and thus fails.

The Court notes that its conclusion that the CLSA need not be submitted to the PSC for approval is consistent with the conclusion of a another state commission that recently addressed the issue. The commission for the state of Washington recently concluded that an agreement markedly similar to the CLSA submitted to the PSC here is not subject to section 252.[46] Although this decision is not binding on the Court, it is instructive with respect to how another state regulatory body views line sharing agreements in relation to section 252.

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[45]Declaratory Order, ¶ 8, n.26 (emphasis in original).

[46]See Order No. 02: Dismissing Petition, In the Matter of the Petition of Multiband Communications, LLC, for Approval of Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. UT-053005 (WUTC April 19, 2005)("Washington commission order")(attached to Qwest's Reply at attachment 1).

Finally, the Court believes that its conclusion herein is consistent with the intent of the FTA. Congress, in enacting the FTA, sought to promote competition by removing unnecessary impediments to commercial agreements entered between ILECs and CLECs, and also to recognize certain ongoing obligations for interconnection agreements. The result reached here is not at odds with either of Congress' purposes in enacting the FTA.[47]

V. *CONCLUSION*.

Based on the foregoing, the Court concludes that the CLSA is not a negotiated interconnection agreement that must be submitted to the PSC for approval under section 252. Accordingly,

IT IS ORDERED that Qwest's Motion for Judgment on Appeal[48] is GRANTED in part and DENIED in part as follows:

1. The CLSA[49] at issue herein is not subject to review and

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[47]The Court finds unpersuasive the PSC's argument that the physical linking of Qwest's and Covad's networks makes the CLSA an "interconnection agreement." The CLSA concerns only line sharing which, as already noted, is not a service or element that must be included in an interconnection agreement.

The Court also declines to afford the PSC's decision Chevron deference. The Ninth Circuit has ruled that a state commission's interpretations of the FTA are subject to de novo review. US West Communications v. MFS Intelenet, 193 F.3d at 1117. The Court declines the PSC's invitation to "revisit the standard of review that should be applied to a state commission's authority to require an interconnection agreement to be filed."

Finally, the Court finds moot the PSC's argument that it may add to the list of required UNEs. Even if this argument had a legal basis, there is no evidence before the Court that the PSC has formally decided to add line sharing to the list of UNEs. Thus, the issue is moot.

[48]Court's Doc. No. 31.

[49]Cmplt. ex. 2.

approval by the Defendants under section 252 of the FTA.

2. The PSC's Final Order and Order on Reconsideration[50] issued on September 22, 2004, is therefore VACATED.

3. All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

The Clerk of Court shall enter Judgment accordingly.

DATED this 9th day of June, 2005.

Carolyn S. Ostby
United States Magistrate Judge

CERTIFICATE OF MAILING
DATE: 6/10/05 BY:
I hereby certify that a copy of this order was mailed to:
James Haire
Fred Smith
Monica Brand

[50] Cmplt. ex. 9.

FILED, ENTERED AND NOTED IN
CIVIL JUDGMENT BOOK 38
JUNE 10, 2005
PATRICK E. DUFFY, CLERK
By

United States District Court

FOR THE DISTRICT OF MONTANA
HELENA DIVISION

QWEST CORPORATION, a Colorado corporation Plaintiffs, vs. **THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Motnana** Defendants.	**JUDGMENT IN A CIVIL CASE** **CASE NUMBER: CV-04-053-H-CSO**

IT IS ORDERED AND ADJUDGED that Qwest's Motion for Judgment on Appeal is GRANTED in part and DENIED in part as follows:

(1) The CLSA at issue herein is not subject to review and approval by the Defendants under section 252 of the FTA.

(2) The PSC's Final Order and Order on Reconsideration issued on September 22, 2004, is therefore VACATED.

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IN CIVIL JUDGMENT BOOK
VOLUME , PAGE

(3) All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

Dated this 9th day of June, 2005.

PATRICK E. DUFFY, CLERK

BY RENATE WELDELE COURT SEAL

RENATE WELDELE, DEPUTY CLERK